United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1508

To be argued by
SARAH S. GOLD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1508

UNITED STATES OF AMERICA,
Appellee,

—v.—

LEROY HAYES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Leroy Hayes appeals from a judgment of conviction entered on June 17, 1976, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Indictment 76 Cr. 362, filed April 9, 1976, charged Leroy Hayes in four counts with two separate bank robberies in violation of Title 18, United States Code, Sections 2113(a) and (d). Count Five charged Hayes with assaulting Agents of the Federal Bureau of Investigation in violation of Title 18, United States Code, Sections 111 and 1114.

A hearing was held on June 15, 1976, on Hayes' pretrial motions to suppress certain physical evidence and

post-arrest statements. Those motions were denied that same day.

Immediately thereafter, trial commenced. The trial ended on June 17, 1976, with the conviction of Hayes on all five counts.

On July 14, 1976, Hayes was sentenced to 15 years on Count Two and to 15 years on Count Four to run consecutively to each other. On Count Five, Hayes was sentenced to three years to run consecutively to the sentences on Counts Two and Four.

Statement of Facts

The Government's Case

A. Synopsis

The Government proved by overwhelming evidence that Hayes, within a one-week period, robbed two federally insured banks, and a Swiss bank, all located in midtown Manhattan.

A total of ten eyewitnesses to the three bank robberies identified Hayes as the bank robber. In addition, surveillance photographs taken in the Swiss bank clearly depicted the defendant in the process of robbing that bank.*

The Government also proved that shortly before Hayes' arrest, the day after the last bank robbery charged in

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* Testimony concerning the Swiss bank robbery was received as similar act proof demonstrating identity and a common scheme or plan. The robbery of the Swiss bank could not be included in the indictment, because the bank was not federally insured.

the indictment, he was observed walking in and out of still another bank. He was then arrested and found in possession of a silver-colored gun similar to that used in the three bank robberies. During Hayes' arrest, he assaulted the arresting officers.

B. The Swiss Bank Corporation Robbery

On March 24, 1976, at 10:30 a.m., Hayes robbed the Swiss Bank Corporation, 608 Fifth Avenue, at 49th Street.

Hayes approached Gemma Durand, a teller, who was assisting a customer, Anthony Norton; said it was a "holdup"; and demanded all of her large bills. (Tr. 273). Hayes, pointing a gun at Norton, told Durand, "just give me your money or I'll shoot this gentleman next to me." (Tr. 301). Frank Grasso, an assistant treasurer who was standing next to Durand, told her, "do exactly as he says." (Tr. 288). Durand then handed over all the $100 bills in her cash drawer.

Not satisfied with the $100 bills Hayes demanded more money. After taking the teller's $20 bills, he jumped over the customer waiting line ropes and ran out of the bank, heading west towards Sixth Avenue.

The witnesses described Hayes as a tall, light-skinned, mustached, black man with white tape on his nose wearing a coat, ski cap, dark glasses, and carrying a silver colored gun. (Tr. 272-75, 288-89, 303-04). At trial, less than three months after the robbery, Durand, Norton and Grasso each identified Hayes as the robber. (Tr. 276, 289, 305).

C. The Manufacturers Hanover Bank Robbery

The next day, March 25, 1976, at 9:15 a.m., Hayes robbed the Manufacturers Hanover Trust Company, 401 Madison Avenue, at 47th Street.

Hayes approached the teller's station, holding a silver-colored gun to the neck of a bank guard. He told the teller, "this is a holdup. Don't pull the alarm or I'll kill him." (Tr. 137). The teller, Evelyn Aird, told Hayes that she did not have any money at her station.

Hayes, continuing to press the gun to the bank guard's neck, pushed him over to the next teller's station. There, Hayes said, "turn over your large money." (Tr. 150). The teller, Louis Cicillini, handed Hayes a large sum of money, approximately $9,000. Hayes then demanded, "Give me more of your money." (Tr. 154).

Since Cicillini had already given all of his money to Hayes, Richard Caro, the head teller, who was at the next station handed Cicillini more money which Cicillini then gave to Hayes (Tr. 153). Hayes took the money, ran out of the bank "stumbling over the customer ropes" and headed west on 47th Street. (Tr. 140).

The witnesses described Hayes as a tall, light-skinned black man with side-burns and a mustache, dark glasses, a ski cap, suit, coat, carrying a silver-colored gun and a briefcase. (Tr. 138, 151-52, 165-66). At trial, Aird, Cicillini and Caro each identified Hayes as the robber. (Tr. 139, 153, 167).

D. The Chase Manhattan Robbery

One week later, on April 1, 1976, at approximately 10:30 a.m., Hayes robbed the Chase Manhattan Bank, 110 West 52nd Street.

Hayes entered the bank and told the assistant treasurer, James Dishington, that he wished to open an account for $20,000. Hayes then told Dishington to look in

his briefcase where Dishington saw a gun. Hayes then said, "I want $20,000 in large bills, and you walk with me to the teller." On the way to the teller's counter, Hayes told Dishington "smile or you'll be dead." Noticing a guard, Hayes also told Dishington: "[I]f that guard pulls his gun, you're dead." (Tr. 177).

Upon reaching the teller's counter, Hayes repeatedly threatened Dishington, "hurry up or you are dead." The teller handed cash to Hayes three times, and each time Hayes said it was not enough. (Tr. 178, 214). Finally, Dishington said, "you have enough. Now get the hell out of here." (Tr. 177-78).

Hayes took the money, but as he left the bank, he turned and said, "that's not enough. I'll be laying for you, and I'm coming back tomorrow." (Tr. 178).

Hayes was described by witnesses as a tall, light-skinned black man with sideburns and a mustache, wearing dark glasses, a ski cap and carrying a briefcase. (Tr. 174-75, 187, 217-18, 255). Four witnesses to this robbery testified and each identified Hayes as the robber. (Tr. 175, 188, 219, 256).

E. Hayes' Arrest

The following day, April 2, 1976, at approximately 11 a.m., two agents of the Federal Bureau of Investigation, Barry Mawn and Joseph Martinolich, were driving uptown on Madison Avenue between 38th and 39th Streets. As they did so, Mawn saw a black man standing on the east side of the street wearing a tan hat, suit, tie, sunglasses, a band-aid on his nose and carrying a briefcase. (Tr. 318). The two agents pulled their car over, and walked back to where the man was standing. Passing within five feet of Hayes, they entered a building vestibule directly behind him. At this point, Agent

Mawn could see that Hayes also had sideburns and a mustache. (Tr. 331).

Agent Mawn had with him surveillance photographs from two robberies which had occurred the prior week at the Swiss Bank Corporation and the Manufacturer's Hanover Trust Company. Mawn and Martinolich compared the photographs with Hayes. (Tr. 331-32; 436).*

As the agents compared the photos—to Hayes, Hayes was standing at a bus stop looking across the street at the Irving Trust Company. Hayes stood at the bus stop for 2 to 3 minutes, not boarding any of the buses which passed. (Tr. 320). He then rushed across Madison Avenue in mid-block dodging in between traffic and entered the vestibule of a building with an entrance into the Irving Trust Company. (Tr. 320, 437). The two agents followed Hayes. Hayes was seen coming out of the bank entrance. (Tr. 438). Hayes then stood in the vestibule, looking out onto the street. Agent Mawn followed his glance and saw two other FBI agents, Agents Henehan and Roach, in an unmarked car. (Tr. 332).

Hayes then promptly left the building entrance and started walking north on Madison Avenue. Knowing that Hayes had used a weapon during his past bank robberies, Agent Mawn told the other two agents that he was going to arrest Hayes and that Hayes carried a weapon in his briefcase. (Tr. 323, 411, 419-20). All four agents followed Hayes.

After crossing 39th Street, while still two to four feet away from Hayes, Agent Martinolich pulled out his gun and announced, "freeze, F.B.I." (Tr. 324, 421).

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* At the pre-trial suppression hearing, Agent Mawn testified that his comparison of the photos with Hayes led him to believe that the man depicted in the photographs was the same man he was then viewing.

Hayes turned slightly to the side where he was carrying his briefcase, reached with his free hand towards the case, and a struggle ensued. Agent Mawn grabbed at Hayes' left arm; Agents Martinolich and Roach grabbed his right arm. Hayes still had his briefcase in one hand. At some point, Agent Henehan put his hand into the briefcase over what felt like a gun, and Hayes' hand entered the briefcase on top of Henehan's hand. (Tr. 421-22). Agent Martinolich helped to get Hayes' hand out of the briefcase and finally got it away from Hayes altogether. The briefcase contained a silver-colored gun loaded with six bullets. (Tr. 425).

While Hayes was being pushed up against the wall, he put a piece of paper from his hand into his mouth. Hayes continued to struggle and hit Agent Henehan with his elbow. (Tr. 423). Agent Martinolich attempted to get the paper out of Hayes' mouth, but Hayes bit him. (Tr. 444). The agents finally succeeded in handcuffing Hayes with two pairs of cuffs. (Tr. 326-28, 421-24, 440-45).

The Defense Case

Hayes offered an alibi defense to the robbery at the Manufacturer's Hanover Trust Company on March 25, 1976, through the testimony of two attorneys. Each testified that they knew Hayes and had seen him on March 25th in Bronx County Supreme Court, at 161st Street on the Grand Concourse. One testified that he first saw Hayes between 9:45 and 9:50 and the other somewhere between 9:45 and 10:15. (Tr. 352, 360).*

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* On cross-examination, it was determined that on either March 25th or March 26th, Hayes had paid one of these attorneys legal fees of $2,500 in large bills. (Tr. 367-68). Furthermore, on April 1st, the date of the Chase Manhattan robbery or the next day, April 2nd, Hayes had paid the same attorney $500 cash in one hundred dollar bills. (Tr. 369). Prior to those payments, Hayes had paid his attorney by check. (Tr. 369-70).

The Government thereafter called a witness to prove that Hayes could have robbed the bank on March 25th and still been at the Bronx County Courthouse at the time the two alibi witnesses saw him there.* Hayes had last been seen, at around 9:30 a.m. on that date, heading west on 47th Street. The testimony was that, on a trial run, it took just nineteen minutes to travel on the D train from the 47th Street station at Sixth Avenue to the 161st Street station in the Bronx. The same route took 21 minutes by taxicab.

Indeed, one of the attorneys called by Hayes had testified that on March 25th he himself had taken the D train from the 34th Street station to the 161st Street station in about 20 to 25 minutes.**

ARGUMENT

POINT I

Probable Cause Existed for Hayes' Arrest.

Hayes contends that probable cause did not exist for his arrest. This contention is absurd. Probable cause existed from bank surveillance photographs from two of the robberies, additional available information concerning the identity of the robber at all three banks, and Hayes' actions shortly before his arrest.

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* Had the defense witnesses not been taken out of turn by agreement (see Tr. 347), this witness would have been offered as a Government rebuttal witness.

** In addition, there was a stipulation entered into between the Government and the defense that the scheduled running time for the D train express is 22 minutes.

There was no issue in this case of whether a crime had been committed as in *Beck* v. *Ohio*, 379 U.S. 89 (1964). The only issue here was whether Hayes was the robber.

Agent Mawn testified that prior to the arrest, he had in his possession bank surveillance photographs from robberies the prior week at the Swiss Bank Corporation and at the Manfacturers Hanover Trust. The photographs of the robber at the Swiss Bank were crystal clear. Mawn testified that he stood, at one point, only five feet from Hayes and that, comparing Hayes and the photographs, he determined it was the same person. (Tr. 6).

The surveillance photographs alone certainly gave the agents sufficient probable cause to believe Hayes was the robber and thus to arrest him. See Fed. R. Crim. P. 4(c)(1) (requiring for an arrest warrant "any . . . description by which [the defendant] can be identified with reasonable certainty"). Indeed, this Court has previously observed that a comparison of a defendant with bank surveillance photographs can be sufficient, in itself, to convict a defendant beyond a reasonable doubt. See *United States* v. *Fernandez*, 456 F.2d 638, 642 (2d Cir. 1972). Surely, then, such a comparison should be sufficient to support a finding of probable cause.

In any event, here there was more than just the surveillance pictures on which to base probable cause. In addition to the photographs, Mawn had descriptions of the robber of the three banks. (Tr. 318). In fact, Hayes was initially spotted by the agents because he was dressed in the same peculiar fashion as the robber of all three banks, that is in a business suit and tie but wearing a ski cap on his head. Also, he had a white bandage across his nose, as did the robber in the Swiss Bank, and sunglasses, as did the robber in all three other banks.

Finally, Hayes' behavior during the agents' surveillance added to the probable cause. He was standing in the same general area where the three prior robberies occurred, at around the same hour of day, and was watching the Irving Trust Company from across the street. He then abruptly crossed the street, entered that bank from the vestibule of an adjacent building, briefly exited the bank and finally went off down the street. From Agent Mawn's testimony, it is clear that he believed Hayes' departure from the bank was caused by his having spotted two other FBI agents in a parked car outside the bank.

In light of all these facts, there was surely probable cause to arrest Hayes.*

POINT II

The Trial Court Did Not Abuse Its Discretion In Its Ruling On Hayes' Prior Narcotics Conviction.

Hayes contends that the trial court abused its discretion in denying a pre-trial motion seeking to preclude the Government from using a recent narcotics conviction to impeach Hayes if he chose to testify. This contention is without merit.

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* The principal case on which Hayes relies is totally inapposite. The evidence of probable cause here bears no relationship whatever to the facts of *United States* v. *Shavers*, 524 F.2d 1094 (8th Cir. 1975). There, the officer who arrested the defendant while the defendant was "walking at a fast pace," knew only that two Negro males were wanted for attempted armed robbery. One was described as 5′ 8″ tall" with dark clothing, and the other was described as 5′ 8″ tall." 524 F.2d at 1095. Such a paucity of information does not even begin to resemble the detail presented in this case.

Rule 609(a), Federal Rules of Evidence, governs the use of prior convictions for impeachment of a defendant.* That Rule provides that a prior felony conviction may be used to impeach the credibility of a defendant if the Court determines that the probative value of admitting it outweighs its prejudicial effect.

Hayes claims the trial court abused its discretion, because the prior conviction was not particularly relevant to his veracity and thus had little probative value, and because it was highly prejudicial since it was so recent. The trial court, however, using a balancing test, made an appropriate determination that, given the nature of the prior conviction and its age, its probative value outweighed any prejudicial effect.

First, the trial court found that the prior conviction, a narcotics conviction, being different in nature from the current bank robbery charges, would not lead to the "inevitable prejudice which would arise from prior conviction for the same crime." (Tr. 122). Generally, convictions for the same crime are admitted sparingly, "because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'" *United States* v. *Gordon*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968) (citation

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*Rule 609(a) provides:

"*General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

omitted). See *United States* v. *Puco*, 453 F.2d 539, 542 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1973); *United States* v. *McIntosh*, 426 F.2d 1231 (D.C. Cir. 1970).

Second, this Court has specifically held that trial judges have discretion to admit prior narcotics convictions to impeach defendants. See *United States* v. *Christophe*, 470 F.2d 865, 870 (2d Cir.), *cert. denied*, 411 U.S. 964 (1972); but *cf. United States* v. *Puco*, 453 F.2d 539, 542 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1973). This proposition is also supported by the decisions of other Circuits. *United States* v. *Villegas*, 487 F.2d 882 (9th Cir. 1973); *United States* v. *McIntosh*, 426 F.2d 1231 (D.C. Cir. 1970).

Third, Hayes' particular prior narcotics conviction—*smuggling* cocaine into the United States from Colombia—bears far more directly upon credibility than does the ordinary narcotics convictions for possession or distribution. Thus, the conviction here was similar to that in *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974), where, in a narcotics case, this Court found a prior conviction for the interstate transportation of untaxed cigarettes "related to veracity."

Fourth, Hayes' prior narcotics conviction was also uniquely relevant to his credibility, since it was the result of a prior trial at which he took the stand and testified in his own behalf. Such a conviction "is a *de facto* finding of lack of credibility of the defendant." *United States* v. *Gordon*, 383 F.2d 936, 940 n.8 (D.C. Cir. 1967).

The trial court also correctly found that the temporal proximity of the prior conviction to the current charge weighed in favor of its admissibility. Hayes was convicted of smuggling cocaine into the United States in May of 1976, just two months prior to the trial of this case. Although Hayes argues that "it was the very re-

cency of the conviction which would make prejudice inure to the defendant" (Br. at 11), it is not surprising that this argument is unadorned by citations to relevant cases, since the cases uniformly hold that prejudice is a product of remoteness, not proximity, in time. See, *e.g.*, *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974) (conviction "not remote in time"); *United States* v. *Puco*, *supra*, 453 F.2d at 543 ("[p]robative force . . . is greatly diminished by age"); *United States* v. *Divarco*, 484 F.2d 670 (7th Cir.), *cert. denied*, 415 U.S. 916 (1973). See also 609(b) F. R. Evid.

Hayes' final argument, that this was a case where the nature of the defense, an alibi, required testimony which he was prevented from providing, is unpersuasive. The defendant was not, after all, precluded from presenting his defense. See *United States* v. *McIntosh*, 426 F.2d 1231, 1235 (D.C. Cir. 1970) (Bazelon, C.J., dissenting). Two attorneys testified, without contradiction, that Hayes was in state court shortly after the bank robbery on May 25, 1976. The only issue for the jurors to resolve was whether Hayes had adequate time to rob the bank and reach state court in time for the attorneys to meet with him. Similarly, Hayes' testimony was also not vital on the assault charge. Hayes' defense to Count Five was that the FBI Agents had engaged in misconduct and, at trial, wilfully perjured themselves to cover up their misconduct. (Tr. 515). The District Court recognized that the credibility of the agents could be put in issue through cross-examination of the agents themselves. Moreover, Judge Cooper had already sat through a pretrial suppression hearing at which one of the agents had testified and had undergone lengthy cross-examination and at which Hayes had testified. The trial court was, therefore in an excellent position to evaluate the necessity for Hayes' testimony at trial. See *United States* v. *Gordon*, *supra*, 383 F.2d at 941.

In sum, this was not a case in which it would have been "in the interest of justice to allow one with prior convictions to assume the role of pure integrity on the stand. . . ." *United States* v. *McIntosh, supra,* 426 F.2d at 1234.

POINT III

The Similar Act Evidence Was Properly Admitted.

Arguing that the evidence was "unnecessary," Hayes contends that the trial court abused its discretion in permitting proof of the prior uncharged bank robbery at the Swiss Bank Corporation on the issue of identification. Hayes further contends that the trial court's limiting instruction with respect to that evidence was prejudicial. Both of these contentions are meritless.

The *modus operandi* of the Swiss bank robbery was remarkably similar to that of the two later bank robberies. All three banks were located in midtown Manhattan; all three robberies occurred in the morning hours; a pistol was used in each robbery; a single individual robbed each bank; the robber wore a suit, tie, knit cap and dark glasses during each robbery; and the robber was consistently described as a tall, light-skinned, black man with a mustache. Indeed, the similarity of the three robberies led defense counsel to argue that it was clear that the same man had robbed all three banks and that therefore Hayes' alibi defense for March 25, 1976, the date of the Manufacturers Hanover robbery, required that Hayes be acquitted of all three bank robberies.

Hayes does not question the well-settled rule in this Circuit that evidence of other crimes is admissible except when offered solely to prove criminal character. *E.g.*, *United States* v. *Campanile,* 516 F.2d 288, 292 (2d Cir.

1975); *United States* v. *Gerry*, 515 F.2d 130, 141 (2d Cir.), *cert. denied*, 423 U.S. 1032 (1975); *United States* v. *Keilly*, 445 F.2d 1285, 1288 (2d Cir.), *cert. denied*, 406 U.S. 962 (1971) see also Fed. R. Evid. 403, 404(b). Nor does he contest that evidence of a prior criminal act is admissible to prove the identity of the perpetrator, that is, to show that that person who committed this other act is the same person who committed the crime charged. *See United States* v. *Campanile*, *supra; United States* v. *Keilly*, *supra; United States* v. *Mahar*, 519 F.2d 1272 (6th Cir.), *cert. denied*, 423 U.S. 1020 (1975). Moreover, Hayes concedes, as he must, that the trial court has wide discretion to balance the need for similar act evidence against its prejudicial effect. See, *e.g.*, *United States* v. *Albergo*, Dkt. No. 75-1279, slip op. 4215 (2d Cir., June 17, 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 533 U.S. 49 (1976). What Hayes does argue is that there was no "need" for the Swiss bank robbery testimony, because the witnesses to the later bank robberies had made in-court identifications of Hayes. This claim is frivolous.

Prior to trial the District Court explicitly declined to make a ruling concerning the admissibility of the Swiss bank testimony, stating that the Court would be in a better position to assess the need for that testimony after hearing the Government witnesses testify concerning the later robberies. (App. 15). All but one of the Government's witnesses had testified about the identity of the robber at the two banks charged in the indictment before the Court ruled admissible the similar act evidence of the Swiss Bank robbery, finding that it was not cumulative but necessary and extremely helpful on the issue of identity. (App. 30-35). Although the Government witnesses made in-court identifications of the defendant, counsel's cross-examination demonstrated that the wit-

nesses' recollections were not precise. The District Court, in ruling the Swiss Bank robbery evidence admissible, noted that the bank surveillance photographs from the Swiss Bank were crystal clear (App. 32), whereas the surveillance photographs from the other two banks were extremely poor. In addition, the Court observed that only the Swiss Bank photographs showed the silver-colored gun and white tape on the robber's nose. (App. 31-32). These two items, which various witnesses testified about, were vital to the identity issue at trial. In sum, there was clearly no abuse of discretion in the Court's finding that this evidence was relevant on the sole, and hotly contested, issue in this case, the identity of the bank robber.

Hayes also argues that the trial court's limiting instructions concerning the use of similar act evidence were prejudicial, because they "help[ed] . . . cement an impression in the minds of the jurors of a positive identification" and "strongly inferred that this evidence was going to cure . . . the infirmities of the identification." (Br. at 19). A cursory review of the record reveals this contention is without support.

When the Swiss Bank evidence was about to be offered, defense counsel requested a side bar. There, arguing that the usual limiting charge "will tend to confuse the jury," he specifically waived any limiting instructions. (App. 35). Given this unusual request, court and counsel adjourned to the robing room.

The Court decided after a brief discussion that a limiting instruction was necessary so that the jury would have some idea of the purpose of this evidence. Defense counsel requested that the Court, in its limiting instruction, not emphasize that similar act evidence is inadmissible to show bad character because "then the jury says,

'oh, but it could be used as evidence of bad character' " (App. 39). Counsel also asked that the Court advise the jury that simply because this evidence was being admitted on the issue of identity did not mean that the evidence proved that Hayes was the robber. (App. 45).

Returning to the courtroom the District Judge then informed the jury that testimony concerning the Swiss Bank was being admitted "to enable the jury to consider it in connection with the problem of identification" and that more complete instructions concerning the use of this evidence would be given later. The Court stated:

> "The Court: Ladies and gentlemen of the jury, we have had a discussion in the robing room with respect to certain evidence that is going to be admitted. That evidence requires a word or two of definite instruction from the judge.
>
> It relates to an alleged robbery at a Swiss Bank—I don't know for the moment what the full name is—Swiss what?
>
> Mr. Nesland [the Assistant United States Attorney]: Swiss Bank Corporation.
>
> The Court: —Swiss Bank Corporation. Now, this defendant on trial before you is not charged with any crime relating to the Swiss Bank.
>
> *Then why do we allow that evidence in? It is to enable the jury to consider it in connection with the problem of identification. Was this defendant on trial before you the man at the Chase Bank? Was he the man at the Manufacturers Hanover Bank?*
>
> It must be clear to you by this time that the witnesses testified about a person coming into the bank, the Chase Bank and the Manufacturers

Bank, and according to them, using the words and the gun, and all the rest of it, it was enough to put them in a certain amount of fear, and so the identity is not as clear cut, defined as it might be, let's say, if there was a conversation under ordinary circumstances lasting 10, 15 minutes in which a person would have had opportunity to sum up and closely observe the person being interviewed.

And so the law says that the Court in its discretion may admit the evidence which you are about to hear for the limited purpose of identification. And the Court must insist that you understand that it's going in for that limited purpose and that you will obey the Court's direction that its admissibility was for that purpose and not to prove another crime.

Do I make myself clear?

Has anybody any doubt about it? *I can't give you the whole law on that right now.* It will become far more clear after you hear the evidence and after the judge comes to the point where he charges the jury on the law, but right now I just want to know whether what I have said in and of itself makes sense and is clear to you. And you're not to hesitate when the judge says, 'Is it clear?' You are not to hesitate to raise your hand and say, 'Judge, I don't quite get this,' or 'I don't quite get that.' Don't hesitate to do that.

I ask you again, what I said, is it clear to you? Has anybody any question on it?" (App. 46-48) (emphasis supplied).

No objection was taken to this charge, nor was any request made to modify it.

Shortly before summations were to begin, defense counsel represented to the Court that he intended, in his summation, to refer to the Court's limiting instruction "just reminding [the jurors] that you had given them a charge on the Swiss Bank evidence. You gave them a preliminary explanation Your Honor." (Tr. 488). There was not even a hint that defense counsel was displeased with the earlier instruction.

After summations, the District Judge delivered his main charge to the jury. The Court's charge on the similar act proof was comprehensive, carefully constructed and eminently fair. The Court stated:

> "Now we come to the evidence relating to the Swiss Bank. You remember that episode happened, according to the testimony, on March the 24th of this year, the day before the episode in the Manufacturers Hanover Bank.
>
> That testimony deals with the testimony relating to the defendant's alleged similar act or offense at the Swiss Bank, which occurred, I repeat, on March 24. Evidence that an act was done one time or on one occasion is not any evidence or proof whatever that a similar act was done at another occasion. I repeat that: Evidence that an act was done at one time or on one occasion is not any evidence or proof whatever that a similar act was done at another time, or on another time, or on another occasion. That is to say, evidence that a defendant committed an act of a like nature may not be considered by the jury in determining whether the accused committed any crime actually charged in the indictment. Then how may it be considered, this evidence relating to the Swiss Bank?

> The jury may consider that evidence for the specific limited purpose of demonstrating similarity of method and similarity of mode of operation, which might shed some light on the identity of this defendant as the man who committed the criminal acts at the Manufacturers Hanover Trust and at the Chase Manhattan Bank.
>
> I repeat: The jury may consider that evidence with regard to the Swiss Bank for the specific limited purpose of demonstrating similarity of method and similarity of mode of operation, which might shed some light on the identity of this defendant as the man who committed the criminal acts at the Manufacturers Trust Company and at the Chase Bank.
>
> In other words, the reason evidence of the Swiss Bank was admitted is that if there be such a similarity of method, sometimes that may shed some light or indicate in some fashion that three bank robberies were committed by the same person because the method of their commission was alike.
>
> Such evidence relating to the Swiss Bank offense may not, I emphasize, may not be considered by the jury for any other purpose whatsoever. I emphasize, the jury is not to infer that the defendant has a criminal propensity or bad character because of this evidence." (Tr. 592-94).

Not surprisingly, no objection was taken to this portion of the charge.

Hayes' claim that the Court's initial limiting instructions implied that the deficiencies in the Government's case had been cured by the Swiss Bank testimony is not supported in the slightest by the charge actually given.

Moreover, the defendant's failure to raise any objection below certainly constitutes a waiver. See *United States* v. *Pelose*, 538 F.2d 41 (2d Cir. 1976); *United States* v. *Nathan*, 53 F.2d 988, 992 (2d Cir. 1976); *United States* v. *Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975), *cert denied*, — U.S.— (1976). Finally, even assuming *arguendo* that the initial limiting instructions were somehow deficient, the Court specifically advised the jury that the final charge would explain in more detail the significance of the similar act proof and that final charge was fair and complete. The effect of the initial charge must, of course, be considered in conjunction with the later charge. *E.g.*, *United States* v. *Sears*, Dkt. No. 76-1154, slip op. 257, 262-63 (2d Cir., Oct. 26, 1976).

POINT IV

The Court's Supplemental Charge On Count Five Was Responsive And Not Prejudicial to Hayes.

Hayes argues that the second of the Court's two supplemental charges to the jury concerning lawful resistance to law enforcement officials was "unresponsive, argumentative and prejudicial" and requires reversal not only of his conviction on Count Five for assaulting federal officers but also of his convictions for bank robbery. Again, a review of the transcript does not support Hayes' contention. The charge was responsive, fairly balanced and can in no way be characterized, as the defendant would have it, as a directed verdict of guilty. (Br. at 22). And even assuming some error could be found in the supplemental charge on Count Five, there is no reason to believe that it had any spill-over effect on the bank robbery charges.

In its initial charge, the District Court instructed the jury on the law to be applied to Count Five of the indictment. The Court correctly advised the jury:

"Although you must find as the first element that the persons allegedly assaulted were federal employees engaged in the performance of their official duties, the Government is not required to prove that the defendant knew that the persons were federal employees. To state it another way, it is no defense that the defendant did not know that the persons were federal agents.

Congress has provided in the law, which I read to you, that whoever interferes with a federal employee in the performance of his duty is guilty of an offense, whether he does it with knowledge that the person with whom he interferes is a federal employee or not, and whatever may be his intent in so doing.

All that the statute in question requires is an intent to assault, not an intent to assault a federal officer.

Of course, if a defendant, acting in good faith, out of an ignorance of the officer's identity, believes that he is acting in lawful defense of his person or property, and uses no more than reasonable force in effectuating that purpose, he might be justified in exerting an element of resistance, and such an honest mistake of fact would be inconsistent with criminal intent." (Tr. 578-79).

* * * * *

"You have heard testimony that FBI agents Mawn, Martinolich, Henehan and Roach used force upon the defendant when he resisted the arrest. I instruct you that the law says that an officer in endeavoring to make an arrest in a felony case such as this one has the right to use all the force that may be necessary to overcome resistance.

The test is one of reasonableness. Did the agents use reasonable force in light of the amount of resistance encountered from this defendant?

On the question of what constitutes reasonable force, that issue depends on the facts in the particular case. The reasonableness of the force used must be judged in the light of the circumstances, as they appeared to the officers at the time that they acted, the measure being that force which an ordinarily prudent officer would deem necessary under the particular circumstances.

The officers have discretion within reasonable limits to determine what amount of force the circumstances require.

The FBI agents weren't required to wait around and see whether the defendant would do violence to them before they attempted to subdue the defendant. The agents were entitled to use whatever force was reasonably necessary to defend themselves and to arrest the defendant, and weren't limited to the amount of force used by the defendant on them.

Not only is this the law with regard to making an arrest, but also with regard to preserving the evidence, which the arresting officers had good and sufficient reason to believe the person being apprehended is in the process of destroying, and without which evidence a criminal charge will not be supported, and therefore, fail.

The law allows an officer to overcome a resisting defendant if necessary with superior force.

The defendant has raised the ground of self-defense to the charge of assault, as set forth in Count 5.

In order to find the defendant not guilty by reason of self-defense, you must first find that the defendant reasonably believed that he was in

> imminent danger of being assaulted by the FBI agents. If you find that, you must further find that the defendant used no more force than he reasonably believed was necessary to repel this assault." (Tr. 582-84).

No objection was taken to any portion of the charge on Count Five.

After approximately 3 hours of deliberation, the jury requested the Court to reread its charge on Count Five. That charge was reread in its entirety. (Tr. 618-27).

After approximately 40 minutes of additional deliberation, the jury requested that the law concerning Count Five, and a defendant's right to self-defense, be explained to them "in layman's language." The jury's note read as follows:

> "Law concerning assault on officer and right to self-defense regarding 5th charge.
>
> What does the law say if there is a reasonable doubt that the defendant was aware of the identity of the FBI agents? If ignorant, what rights does the defendant have to defend himself?
>
> Could you explain this point in layman's language?" (App. 49).

Since the jury had twice heard the Court's legal instruction on Count Five, and was obviously confused, the trial court decided to supplement its instruction in the plain language requested. Before delivering the charge, however, the Court noted that it was unclear whether the jurors were concerned about self-defense because some had a reasonable doubt that the FBI agents had announced themselves to Hayes at the time of his arrest, or because there was a doubt whether, even if the agents had announced themselves, Hayes was convinced of their identity. Defense counsel agreed that it was impossible to know along which lines the jury was thinking. (App. 51-2).

The District Judge then delivered a supplemental charge, which is reprinted in its entirety at pages 52-67 of the Appendix.* The Court explained the law to the jury using both hypothetical examples and evidence at trial. The supplemental charge emphasized, as had the Court's earlier charged, first that, in arresting a defendant, federal officers have a right to use necessary, but not undue, force. The Court advised:

> "If you have got the impression that they exerted force other than what their duty required, then throw out the charge. But if they used reasonable force, they had a right to." (App. 55).

Second, the Court went on to explain that, if, as the defense contended, the FBI officers did not advise Hayes that they were federal agents and he believed the agents to be strangers, then Hayes had a right to resist arrest. (App. 56-57). The Court then repeated its earlier charge on the law. (App. 62-65), and then summed up as follows:

> "So that if under all the circumstances you say under all the evidence dealing with what took place on that particular occasion, you believe that this defendant, you see, acted in ignorance of the officer's identity, and actually he believed—this defendant believed he was acting in lawful defense of his person or property, and he used no more than reasonable force in effectuating that purpose, he might be justified in exerting an element of resistance, and such an honest mistake of fact would be inconsistent with a criminal intent on his part.

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* Prior to the charge being delivered, defense counsel requested that the Court simply reread the portion of the original charges dealing with self-defense. This request was denied. (App. 52).

> There it is, so that you have to interpret that evidence. I don't know which part you wish to reject or which part you want to accept. But if you find that the evidence warrants you in saying that under all those circumstances this defendant acted in good faith out of an ignorance of the officer's identity, and he believed that he acted in lawful defense of his person or property, and he actually used no more than reasonable force to effectuate that purpose, the law says he might be justified in exerting an element of resistance, and such an honest mistake of fact would be inconsistent with criminal intent on his part to commit an offense." (App. 65-66).

The supplemental charge, far from being unresponsive and unbalanced, as Hayes claims, was a careful attempt to cover each of the conceivable problems which the jury might be having in understanding the law and applying it to the evidence.* The Court explained to the jury that when resistance is offered by an offender to lawful authority, the question is always whether the amount of force used was proper under all the facts and circumstances. (App. 56). The Court explained the differences between various circumstances: resistance by an offender (1) to authority which he knows to be lawful, (2) to authority which he has been told is lawful but does not believe to be, and (3) to authority which he does not know to be lawful. The Court also discussed the difference between situations where haste is required because of the potential for danger or for destruction of evidence and where "one can take it at great ease." (App. 61). Since, as the judge told the jury, "I don't know which part [of the evidence]

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* In *Bollenbach* v. *United States*, 326 U.S. 607, 613-14 (1945), the Court found that cursory instructions were inappropriate under circumstances where a jury makes explicit its difficulties.

you wish to reject or which part you want to accept" (App. 65), he properly covered all the possibilities.* Moreover, after each hypothetical example, the Court very carefully related the point of the example to the instant case. In each instance, the court dutifully noted that the jury could accept or disregard, believe or disbelieve, the testimony of the various witnesses.

Hayes' objections to the Court's use of hypothetical examples is meritless. The two hypotheticals, one involving a resistant drug dealer and the other a deaf man, were introduced, respectively, as "an entirely distinct example" (App. 54) and "an extreme example." (App. 56). There was no possibility, therefore, that the jury thought either example related to the defendant,** and accordingly Hayes' contention that the example involving a drug dealer had a "prejudicial value to any New York area jury" (Br. at 21), is unconvincing.***

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* Defense counsel himself stated to the Court before the Court gave this instruction to the jury "I don't know how they are thinking" (App. 52), and "I don't think we can inquire into their minds to find out." (App. 51).

** See *United States* v. *Lozaw*, 427 F.2d 911, 916-17 (2d Cir. 1970) where this Court refused to reverse a conviction based on the trial court's charge on conspiracy, consisting of a "dramatized example of how conspirators talk and act." The Court noted that "[e]ven without the judge's telling the jurors that the characters, dialogue and plot were factually unrelated to the case under consideration, they could not have thought otherwise." *Id.* at 917.

*** *United States* v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973) is cited by Hayes for the proposition that use of hypotheticals should be avoided. The circumstances of that case, however, in which the Court found that the hypothetical "could well have been omitted," 467 F.2d at 619, were completely distinct from the present case. First, in *Cassino* the hypothetical was given in the Court's main charge before any expression of confusion had been voiced by the jury. See *Bollenbach* v. *United States*, 326

[Footnote continued on following page]

Nor can the "layman's" explanation to the jury be viewed in isolation. Immediately after that explanation to the jury, the Court for the third time read its charge on Count Five and twice reread that portion which dealt with a defendant's good faith use of reasonable force.* Thus, both standing alone and when viewed in the context of all the Court's instructions, the supplemental charge was balanced and responsive.** *E.g.*, *United States* v. *Sears*, *supra*, Dkt. No. 76-1154, slip op. at 262-63.

Even assuming *arguendo* that this Court were to agree with Hayes' contention that the supplemental charge was erroneous, there is not the slightest reason to believe that this error affected the verdict on the bank robbery counts. In addition to the obvious fact that the Court's instructions only covered Count Five and could by no

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U.S. 607, 614 (1945). Second, the general proposition for which the hypothetical was offered in *Cassino*, that jurors should deliberate and exchange views, is not so abstract and difficult for jurors to understand that a hypothetical illustration should be required. Finally, the court in *Cassino* noted, as is true here, that the instruction was not coercive and was followed by a correct exposition of the applicable law.

* Indeed, the Judge distinguished the "layman's language" which he had used to help them from the language which he called "the language that the law lays down" and told the jury that a third rereading to them of the pertinent portions of that charge might allow his "meager attempt just now to enlighten you" to "take on greater significance." (App. 62).

**Hayes' reliance on *United States* v. *Porter*, 386 F.2d 270 (6th Cir. 1967), is misplaced. In *Porter*, the trial court in its charge commented repeatedly on the evidence which the *Porter* court found by sheer volume alone to have submerged the interspersed boiler-plate instructions to the jury that they were the sole judges of the facts. In addition, the comments on the evidence there were so grossly prejudicial as to cause the court to find they "could easily be construed as an expression of [the trial court's] belief that the defendant was guilty." 386 F.2d at 275. No such circumstances existed here.

stretch of the imagination be even arguably applicable to any aspect of the bank robbery charges, a review of the timing of the jury deliberations as well as their notes precludes any argument that the charge "muddl[ed] . . . the rest of the trial." (Br. at 25).

The trial court concluded its charge to the jury at 1:05 p.m. on June 14, 1976. (Tr. 610). At that time, the jury went to lunch. At 4:50 p.m., a note was received from the jury asking for the testimony of all three FBI agents and the Judge's charge on Count 5. Reading the testimony and the court's instructions on Count 5 took until almost 7 p.m. (Tr. 629). The jury was then sent to dinner with instructions to return and resume deliberations at 8:30 p.m. At 9:10 p.m. the jury sent another note, the Court's reply to which is the subject of Hayes' present claim of prejudice. Eight minutes after the Court's supplemental charge, the jury returned their verdict of guilty on all counts.

It is clear from this chronology that the jury had first considered the overwhelming evidence of Hayes' guilt in connection with the two bank robberies charged and had, since that time, been struggling solely with the law on the assault count. And, it is plain that whatever point was troubling the jury with respect to the law on Count Five was cured by the Court's final instructions, enabling them almost immediately to return their unanimous verdict on that count.*

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* In a footnote, Hayes claims that various instances of intervention by the court were prejudicial to the defense, although he acknowledges they "could [not] by themselves be cause for reversal. (Br. 26, n. 14). Each of these instances, in context, were perfectly proper and non-prejudicial.

For example, defendant claims the Court rehabilitated a Government witness by obtaining the recantation of a statement

[Footnote continued on following page]

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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inconsistent with her prior testimony. In fact, the Court was attempting to explain to the witness, and thereby to obtain an appropriate response, the proper use of evidence shown to the witness for the purpose of refreshing her recollection. (Tr. 141-43). Problems with testimony following evidence shown to a witness to refresh recollection occurred repeatedly (e.g., Tr. 309), and led to what Hayes mischaracterizes as the second instance of judicial misconduct. (Tr. 226-27).

The claim that the Judge improperly characterized a damaging piece of Government testimony as "important" is incorrect. The witness was stating his recollection of defendant's appearance on the date of his arrest, and the testimony was thus related to the critical issue in the case, namely, identification. The judge merely characterized as "important' 'the issue to which the testimony related, not the testimony itself.

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

Sarah Schrank Gold being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 18th day of January, 1977 she served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Frederick H. Cohn
299 Broadway
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sarah Schrank Gold

Sworn to before me this
18th day of January, 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977